Supreme Court, U.S.
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No. 08-827

IN THE

Supreme Court of the United States

JUST NEW HOMES, INC.; D. RICHARD TONGE,

Petitioners,

v.

BEAZER HOMES; PULTE HOMES; TOLL BROTHERS; ELLIOT BUILDING GROUP LTD.; K. HOVNANIAN COMPANIES; KATZ BUILDERS & DEVELOPERS, INC; MICHAEL ANTHONY HOMES; RYAN HOMES; SAL LAPIO HOMES; RICHMOND AMERICAN HOMES; C&M HOME BUILDERS, INC.; WEICHERT REALTORS; COLDWELL BANKER REALTY CORP.; RE/MAX 440 REALTY, INC.; LONG & FOSTER REAL ESTATE, INC.; ERA WAYNE SLOTTER REALTY, INC.; HBA OF BUCKS & MONYGOMERY COUNTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Third Circuit's dismissal of direct evidence of a conspiracy to boycott services in violation of the Sherman Act, 15 U.S.C. § 1, establish, impermissibly, a heightened standard of proof in a civil antitrust conspiracy case?

CORPORATE DISCLOSURE STATEMENT

Petitioner Just New Homes, Inc. is a closely held corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Third Circuit in *Just New Homes, Inc., et al. v. Beazer Homes, et al.*, (No. 07-1518), is attached hereto as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania in *Just New Homes, Inc., et al. v. Beazer Homes, et al.*, (No. 05-04198-JF), is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Third Circuit's opinion was entered on September 26, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 15 United States Code, Section 1.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner D. Richard Tonge owns and operates Just New Homes, Inc. ("JNH"), an Internet-based buyers agent in the purchase of new construction homes. The action below alleged a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. It was brought against eleven (11) new home construction companies and five (5) real estate broker/agents, all of whom operate in the Philadelphia metropolitan area. The boycott was facilitated by a trade association, HBA of Bucks and Montgomery Counties ('HBA"), which was also a named defendant. A refusal to deal was effected by Respondents' adoption of a requirement that a prospective homebuyer's broker or agent must be physically present at the buyer's first visit to a new home site. The District Court granted summary judgment against Petitioners on January 22, 2007. The Third Circuit affirmed on September 25, 2008.

Tonge founded JNH in 1999 as an Internet-based real estate information and referral company. JNH employed a staff of seven (7) researchers to continuously maintain and update a database of new home construction sites or communities located in the jurisdictions where it is licensed. The database comprises more than 20,100 new home developments or communities. It was designed specifically to assist potential buyers of new construction housing. More than $1.2 million was invested in JNH.

JNH exclusively represents buyers of new homes. It operated in full compliance with State laws and regulations. New homes are sold primarily on the basis

of an "open listing." Under an open listing, a seller (the homebuilder) has agreed to pay a commission, usually a percentage of the total sales price, to any licensed real estate agent whose efforts are considered the procuring cause of the sale. When JNH produces a ready, willing and able buyer to a homebuilder, as a result of that buyer's use of JNH's website representation, it has earned a commission on the transaction just as if it operated as a traditional "bricks-and-mortar" brokerage company.

Before a prospective new homebuyer can use JNH's database, he or she must enroll as a client of JNH by agreeing to JNH's terms and conditions. Once an exclusive buyer-broker agency relationship is established with JNH, a prospective buyer can search JNH's database on its secure website from any location and at any time using a specific password and personal identification. JNH's clients searched the database using selective criteria such as housing type, location and price range. JNH then presented each client with a list of the new home communities that matched the client's criteria. The prospective buyer selected the new home communities he or she wished to visit from JNH's website and printed a "cash-bonus" coupon for each community selected. Homebuilders typically build model home parks with a sales office in one of the models or place a trailer on-site that is open to prospective buyers at specified times during the week.

JNH registered its clients at each of the new home communities that the client selected from the database via fax or e-mail. The purpose of registration was to (1) disclose JNH's representation of the prospective

buyer to the homebuilder, or its agent (as required by real estate licensing regulations) and (2) to establish the time-line for earning a commission under the "doctrine of procuring cause" should the potential home buyer ultimately purchase a home at that community. The new home community was advised in JNH's fax or e-mail of the time frame in which the prospective buyer planned to visit. Tonge also contacted the selected new home community personally by telephone to advise them of JNH's registration of the client as a prospective buyer. Later, when JNH's clients actually visited the new home site, the homebuilder's agent was presented with a Registration Certificate that identifies the prospective buyer as a client of JNH. The Registration Certificate is printed from JNH's website by the client along with the cash bonus coupon. These procedures insure that a homebuilder is placed on notice that a prospective buyer has been introduced to it through JNH's search and referral services, and that he or she has an exclusive relationship with JNH.

JNH provides the same level of services to a new homebuyer as a traditional "bricks-and-mortar" brokerage company. But, due to the efficiencies realized in JNH's Internet-based search and referral business model, JNH was able to pass a portion of each commission earned to its client, the buyer, as an incentive and inducement to do business. JNH's client received a portion of the commission either as a credit towards closing costs, or as a direct cash rebate. Either way the consumer, JNH's client, received a direct financial benefit by using JNH as its representative in the purchase of a new home. Rebating a portion of the commission also benefited the homebuilder by partially

offsetting the buyer's out-of-pocket transaction costs. Overall, because of JNH's rebate program, a new home became more affordable for its clients. Traditional "bricks-and-mortar" real estate broker/agencies, who competed directly with JNH, are unable to pass a similar benefit along to the consumer and thus found themselves at a competitive disadvantage to JNH.

The efficiencies and cost-savings that allow JNH to rebate a portion of its commission rapidly disappear if Tonge, or another employee, is required to appear physically to register JNH's clients at each initial visit to every new home development. Such a requirement defeats the essential purpose of JNH's Internet-based business model. Since overhead costs would be similar to a traditional real estate broker/agent JNH could no longer pass the savings realized from its more efficient model to its clients in the form of commission rebates. The efficiencies of JNH's business model allow one broker to handle literally thousands of clients.

JNH's business model was derailed by the homebuilders' enforcement of a "physical presence" requirement at the urging of JNH's competitors, the traditional, non-rebating, "bricks-and-mortar," real estate broker/agents. The physical presence requirement has been in existence in one form or another for many years, but it was adhered to mainly in the resale home market. Although the homebuilders claim that the physical presence requirement is a long-standing condition to payment of a commission, JNH was able to execute its business plan successfully because the requirement was largely abandoned until the point that JNH became a competitive force in the market. Earlier,

several homebuilders actually discouraged the physical presence of a buyer's agent at the registration of a potential buyer. For example, in 1999-2000 Respondent Beazer Homes announced it would permit client registrations by fax or e-mail. It reversed itself later and required strict adherence to the physical presence requirement.

There is no legitimate business rationale for requiring a buyer's agent to be physically present for the sole purpose of signing-in at a prospective buyer's initial visit to a new home site as the buyer's agent and homebuilder can more than adequately confirm "procuring cause" through electronic means. This is confirmed by the fact that Tonge did business on numerous occasions with all but two (2) of the Respondent homebuilders without being physically present to register JNH's clients at their initial visits to new home sites. The avoidance of disputes over which agent is entitled to a commission is not a rational justification for use of the highly restrictive physical presence requirement. Under JNH's terms and conditions, if a question is raised as to whether JNH is actually the procuring cause, either because the buyer visited the new home site prior to registration or because the buyer is accompanied by another agent, JNH withdraws from the transaction and terminates its relationship with the buyer. The competitive situation began to shift for JNH in the period 2000-2001. Homebuilders, at the urging of JNH's competing real estate brokers, gradually began adopting and enforcing the physical presence requirement and refused to acknowledge JNH's agency as a procuring cause.

Tonge was actually a member of HBA in 1999-2000. He was personally present at several meetings where real estate agents urged homebuilders to enforce the physical presence requirement to keep non-local agents out of their areas. Pressure was placed on the homebuilders to adopt the physical presence requirement universally by local real estate agents at meetings of HBA's Sales and Marketing Committee. Homebuilders were compelled to act on the realtor's requests since local brokers brought about 50 percent of potential buyers to their new construction sites. A non-compliant homebuilder could expect to be placed at a competitive disadvantage.

In addition to his testimony concerning statements made by competitors that prove collusion, Tonge presented evidence in the form of a letter from a member of the Pennsylvania Real Estate Commission, which stated that all brokers in the local area abide by the physical presence requirement. Also probative of an organized and active conspiracy is the form of a cooperative broker agreement that was promulgated by HBA and that contained the physical presence requirement. According to the sworn testimony of a member of HBA's Sales and Marketing Committee, Steven Katz, a council was created to standardize the form of a cooperative sales agreement in 1996 to address the concerns of JNH's competitors, *i.e.*, sales persons, realtors and marketing directors. The physical presence requirement was standardized across the association at the impetus of local realtors. The appearance of Internet-based rebaters, such as JNH, in the next few years made traditional broker/agents even more insistent that homebuilders adopt the physical presence requirement uniformly to frustrate a business model that could not be challenged competitively.

REASON FOR GRANTING THE PETITION

The District Court granted summary judgment to the Respondents (Appendix B). The Third Circuit reviewed the grant of summary judgment *de novo*. (Appendix A). Although the Third Circuit was constrained to view the facts in the light most favorable to JNH (*Id.*, citing *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 530 (3d Cir. 2006)), it dismissed the evidence of collusion presented by JNH to overcome the self-serving, conclusory affidavits submitted by the principals of several of the Respondents. The District Court converted Respondents' Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure to a Motion for Summary Judgment under Rule 56 following its denial of JNH's Motion for Preliminary Injunction. No discovery was exchanged among the parties prior to grant of summary judgment. Accordingly, JNH's evidence of collusion was uncontested but for flat denials of the existence of a conspiracy in Respondents' untested affidavits.

JNH presented Tonge's personal knowledge of direct statements made by his competitors urging homebuilders to adopt the physical presence requirement at meetings of HBA. Full adoption of the physical presence requirement was a gradual process. The HBA form standardizing the requirement for homebuilders, which is by itself conclusive of the existence of collusion, was released originally in 1996. The requirement was not widely adopted by homebuilders, at the increased urging of the traditional realtors, until later. Thus accounting for the early success of JNH. JNH's competitors recognized JNH's

Internet-based business model as unacceptable competition as it developed in the market. The Third Circuit opinion dismisses the HBA form, and the fact that the requirement was long established among local realtors, as direct evidence of collusion. In fact, the court finds that since the requirement existed before JNH, no collusion could be established. This ignores the fact that a conspiracy in restraint of trade may be a continuing offense renewed during each day of its continuance, and as each new member joins the conspiracy. See *United States v. New York Great Atlantic & Pacific Tea Co.*, 137 F.2d 459 (5th Cir. 1943).

REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE BURDEN AN ANTITRUST PLAINTIFF BEARS IN PROVING A CONSPIRACY SUFFICIENT TO OVERCOME SUMMARY JUDGMENT.

The Third Circuit's dismissal of the evidence presented by JNH in opposition to Respondents' motion for summary judgment is in conflict with other Circuits as it creates a new requirement that a plaintiff in an antitrust case must prove a violation of the antitrust laws by a burden greater than a preponderance of evidence.

The Third Circuit's decision to treat Tonge's evidence as circumstantial rather than direct, and thus conduct the heightened scrutiny required by *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1987), requires Tonge to prove a conspiracy for purposes of summary judgment by more than a preponderance of evidence. The Seventh Circuit

has ruled that there is no heightened standard, such as "clear and convincing," requiring a greater quantum of proof than the ordinary "preponderance of the evidence" standard. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787-88 (7th Cir. 1999).

Matsushita does not provide justification for rejecting evidence that tends to prove the existence of a conspiracy, as Tonge's evidence of concerted action by homebuilders and realtors over the course of several years does in this case. Compare *Matsushita*, 475 U.S. at 567-88 (antitrust law limits the range of permissible inferences from ambiguous evidence; if claim makes no economic sense, plaintiff's evidence must be "more persuasive" than would otherwise be necessary) with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986). The Third Circuit has effectively created a heightened standard of proof requirement on the basis of *Matsushita*, which is not justified by the language of that decision. The Supreme Court's review of this substantial departure from precedent by the Third Circuit is warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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